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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 105

TAFT WOOLEN COMPANY, PETITIONER,

v.

THE UNITED STATES.

BRIEF FOR THE PETITIONER.

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TABLE OF CONTENTS.

	Page
I. Opinion of the Court of Claims	1
II. Jurisdiction	1
III. Questions Presented	2
IV. Assignment of Errors	2
V. Statement of the Case	3
VI. Statutes involved: Sec. 250(d) Rev. Act of 1921; Secs. 607 and 611 Rev. Act 1928; R. S., Sec. 3226	5
VII. Argument	6–22
1. (a) Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions applying only to the Commissioner of Internal Revenue and do not apply to a case where suit is brought in the Courts	6
(b) Section 611 of the Revenue Act of 1928 did not withdraw the consent of the United States to be sued in cases where money was collected as taxes after the statutory period for collection had expired	10
2. (a) If it be held that Congress intended by the enactment of Section 611 of the Revenue Act of 1928 to deprive the petitioner of its right to recover the sum collected after the statutory period for collection had expired, then it is contended that such attempt is unconstitutional and void in that it deprives the petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States	12
(b) Upon the expiration of the time limitation provided for by the Revenue Acts, the petitioner acquired a vested property right	16
(c) If Section 611 is so construed as to deprive petitioner of its property and its vested right of action of recovery, it would be contrary to the Fifth Amendment of the Constitution	17

(d) Congress was without power to extend the statutory bar, in petitioner's case, after it had fallen and petitioner had acquired a vested property right 20

3. The legal principles established by the cases of *United States* v. *Heinszen*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Company*, 257 U. S. 226; and *Campbell* v. *Holt*, 115 U. S. 620, do not apply to the case of this petitioner . . . 22

Conclusion 24

TABLE OF CASES.

Atchison, Topeka & Santa Fe Railway Co. *v.* O'Conner, 223 U. S. 280 18

Bashara *v.* Hopkins, 290 Fed. 592; affirmed 295 Fed. 319; Certiorari denied, 265 U. S. 584; 44 S. Ct. 459 . . . . 14, 24

Bessemer Coal & Coke Co. *v.* Heiner, 39 F. (2d) 492 . . . 21

Blodgett *v.* Holden, 275 U. S. 142 17

Botany Worsted Mills *v.* U. S., 278 U. S. 282; 49 S. Ct. 129 21

Bowers *v.* N. Y. & Albany Lighterage Co. et als., 273 U. S. 346 . . . . . 7, 8, 13, 21, 22

Calder *v.* Bull, 3 Dall. 385 at p. 388; 1 L. Ed. 648 17

Caminetti *v.* U. S., 242 U. S. 470–485; 37 S. Ct. 192; 61 L. Ed. 442; L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168 . . 12

Campbell *v.* Holt, 115 U. S. 628; 6 S. Ct. 209; 29 L. Ed. 483 . . . . . 23, 24

Central Vermont Railway Co. *v.* White, 238 U. S. at p. 511 . . . . . 13, 14

Chapman, Adelaide F. *v.* U. S., 63 Ct. Cls. 424; reversed 49 S. Ct. 7; 278 U. S. 660 . . . . . 7, 8, 9, 10

Chelentis *v.* Luckenback S. S. Co., 247 U. S. 384 18

Christie Street Commission Co. *v.* U. S., 136 Fed. 326; 69 C. C. A. 464 18

County of McCracken *v.* Mercantile Trust Co., 84 Ky. 314; 1 S. W. 585 19

Crump *v.* Guyer, 157 Pac. 321; 2 A. R. L. 331 19

Danzer & Co. *v.* Gulf & Ship Island Ry. Co., 268 U. S. 633 . . . . . 14, 21, 24
Dartmouth College *v.* Woodward, 4 Wheat. 518 18
De Lima *v.* Bidwell, 182 U. S. 199 20
Diamond Alkali Co. *v.* Heiner, 39 F. (2d), 643 9
Dooley *v.* U. S., 182 U. S. 222 10
Eberhart *v.* U. S., 204 Fed. 890–891 . . . . . 14, 24
Ellay Co. *v.* Bowers, 25 F. (2d), 637; Certiorari denied, 48 S. Ct. 601 8
Ettor *v.* Takoma, 228 U. S. at pp. 155, 156 and 158 . . . 18
Fidelity & Columbia Trust Co. *v.* Lucas, 7 F. (2d), 146 . . 18
Forbes Boat Line Co. *v.* Commissioners, 258 U. S. 338 . . 23
Gladney *v.* Syndor, 172 Mo. 318 16
Graham *v.* duPont, 262 U. S. 234 . . . . . 7, 13, 21
Graham & Foster *v.* Goodcell, 36 October Term, 1930 . . 12
Kent Commentaries, Vol. 4, p. 202 16
King (The) *v.* Commissioners, 5 A. & E. 804, 816 12
Lincoln *v.* U. S., 202 U. S. 485 20
Memphis *v.* U. S., 97 U. S. 293 19
Nichols *v.* Coolidge, 274 U. S. 531; 52 A. L. R. 1081 . . . 17
Pearsall *v.* Ry. Co., 161 U. S. 646 16
Prichard *v.* Norton, 106 U. S. 132 19
Rafferty *v.* Smith Bell & Co., 257 U. S. 226 . . . . . 22, 23
Rock Island Ry. Co. *v.* U. S. 254 U. S., at p. 143 18
Russell et al. *v.* U. S., 49 S. Ct. 121 123; 278 U. S. 181 . 14, 15, 22
Smallwood *v.* Gallardo, 275 U. S. 56; 48 S. Ct. 23 18
Toxaway Mills *v.* U. S., 61 Ct. Cls. 363; reversed on confession of error, 273 U. S. 781 . . . . . 8, 13
U. S. *v.* John Barth Co., 27 F. (2d) 782, 784 (reversed on another ground, 279 U. S. 370) 14
U. S. *v.* Emery Byrd Thayer Realty Co., 198 Fed. 242; affirmed 237 U. S. 28 . . . . . 10, 18
U. S. *v.* Hartwell, 6 Wall. p. 396; 18 L. Ed. 830 12
U. S. *v.* Heinszen & Co., 206 U. S. 270 . . . . . 22, 23
U. S. *v.* Henrich, 12 F. (2d) 940 19
U. S. *v.* Lexington Mill Co., 232 U. S. 399; 34 S. Ct. 337; 58 L. Ed. 658; L. R. A. 1915B, 774 12

U. S. *v.* Magnolia Petroleum Co., 276 U. S. 160; 48 S. Ct. 236; 72 L. Ed. 509 15
U. S. et al. *v.* Mo. Pac. R. R. Co., 49 S. Ct. 133; 278 U. S. 269 11
Untermyer *v.* Anderson, 276 U. S. 440; 48 S. Ct. 353 . . . 17
Wagner *v.* Baltimore, 239 U. S. 207, 216, 217 23

MISCELLANEOUS.

I. T. 2382 C. B. VI-2-102 . . . . . 8, 9
Vol. 4, Ency. U. S. S. Ct. Reps. 228 11

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OCTOBER TERM, 1930.

No. 105.

TAFT WOOLEN COMPANY, PETITIONER,

v.

THE UNITED STATES.

BRIEF FOR THE PETITIONER.

I.

OPINION OF THE COURT BELOW.

The Opinion of the Court below was rendered by the Court of Claims on March 3, 1930, in the case of this petitioner against the United States, No. J–61 on the records of that court. The opinion has been reported in 38 F(2d), 704, and is a part of the record on this appeal. (R. 16–23.)

II.

JURISDICTION.

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(a) of the Act of February 13, 1925 (45 Stat. 936).

The date of the judgment of the Court of Claims sought to be reversed is March 3, 1930. (R. 23.)

The petition applying for the writ of certiorari was filed on May 7, 1930, and was granted June 2, 1930 (50 S. Ct., 465; 281 U. S., 717), limited to the question of the validity and effect of Section 611 of the Revenue Act of 1928.

III.

QUESTIONS PRESENTED.

Upon the limited basis under which the petition for certiorari was granted in the case, the questions presented are, whether Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875), is to be so construed as to deprive the petitioner of its title to and right to possession and enjoyment of the money illegally collected from it as a tax after the statutory period for collection had expired, and to deprive it of a vested right of action, which it otherwise would have to its recovery; and, if so construed, does the section violate the Fifth Amendment of the Constitution.

IV.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 applied retroactively to cover the case of petitioner.

2. The Court of Claims erred in holding that Section 611 of the Revenue Act of 1928 was more than an administrative provision and that it was a withdrawal of the consent of the United States to be sued.

3. The Court of Claims erred in not holding that the petitioner acquired a vested property right and a vested right of action upon the expiration of the period of limitation, and in not holding that Congress did not have the power to pass subsequent legislation to deprive the petitioner of these rights.

4. The Court of Claims erred in rendering judgment in favor of the respondent.

V.

STATEMENT OF THE CASE.

The petitioner, Taft Woolen Company, is a corporation duly organized and existing under the laws of the State of Massa-

chusetts, with its principal place of business at Caryville, town of Bellingham, State of Massachusetts. (R. 16 and 17.)

On June 14, 1919, the petitioner filed its statutory income and excess profits tax return for the calendar year 1918, showing a total tax liability of $429,616.20. This amount, plus interest of $89.55, was all paid to the Collector of Internal Revenue by December 13, 1919. (R. 17 and 18.)

On July 29, 1921, petitioner paid an additional income and excess profits tax for the year 1918 in the amount of $3,262.18, making a total payment for the year of $432,967.93. (R. 18.)

On December 8, 1921, petitioner filed its claim for refund of taxes erroneously assessed and collected, the basis of said claim being an application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 18.)

On or about October 7, 1922, the Commissioner of Internal Revenue in consequence of the aforesaid application and claim caused plaintiff's tax liability to be recomputed under the relief provisions of said Act and as a result thereof found that the plaintiff had been overassessed the sum of $92,443, which amount was duly refunded to the petitioner. (R. 18.)

On or about March 25, 1924, the Commissioner of Internal Revenue advised plaintiff that a reexamination of its application for special relief showed that the original allowance was in error and that a correct computation of the plaintiff's tax liability under Sections 327 and 328 of the Revenue Act of 1918 indicated an additional tax of $45,398.73. *"The plaintiff was further informed that the additional assessment necessary to correct the excessive overassessment erroneously determined would be listed immediately without giving the usual thirty day notice as provided in Section 250(d) of the Revenue Act of 1921."* (R. 18 and 19.) (Italics supplied.)

Prior to April 18, 1924, the petitioner filed a claim in abatement in the amount of $45,398.73 *on the grounds that the matter was res judicata, that the collection of the tax was barred by the statute of limitations and that the total tax assessable for said year had already been paid in full.* (R. 19.) (Italics supplied.)

On November 25, 1924, the Commissioner rejected the claim

in abatement and advised the petitioner that the comparatives used in the redetermination "are in the aggregate fairly representative in all the material particulars specified in the Act." (R. 19 and 20.)

On June 1, 1925, the petitioner, under protest, paid to the Collector of Internal Revenue at Boston the sum of $45,398.73 and interest demanded thereon in the amount of $1,800.81. (R. 20.)

On or about May 9, 1927, plaintiff filed with the Collector of Internal Revenue its claim for refund of taxes illegally collected for the year 1918 in the amount of $47,199.54, wherein it alleged that the refund should be made for the reason that the collection of the said $47,199.54 was made more than five years after the return of the plaintiff for the year 1918 had been filed.

At the time of the filing of the suit by the petitioner in the Court of Claims on February 21, 1928, more than six months had expired since the filing of the claim for refund of May 9, 1927, and the Commissioner of Internal Revenue had rendered no decision thereon at the time of the filing of said petition. (R. 22.)

The return of the plaintiff for the year 1918 was neither false nor fraudulent with intent to evade the tax, nor had plaintiff signed any waiver in connection with said calendar year, nor any consent in writing with the Commissioner for a later determination, assessment and collection of the tax.

VI.

STATUTES INVOLVED

The statutes involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875); and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

Section 250(d) of the Revenue Act of 1921 (42 Stat. 277, 265, 266) as applicable here reads in part as follows:

> "* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified

thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *"

Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

"Sec. 607. Effect of Expiration of Period of Limitations Against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement.

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928 (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court

for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim (fol. 6) unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

VII.

ARGUMENT.

1. (a) Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions applying only to the Commissioner of Internal Revenue and do not apply to a case where suit is brought in the courts.

Section 1106(a) of the Revenue Act of 1926 (C. 27, 44 Stat. 9, 113) provides in part as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

It will be noted that Section 1106(a) prevents a "credit or refund" unless the taxpayer has overpaid the tax. Since the

Commissioner of Internal Revenue is the only person authorized to make a "credit" or a "refund," it is quite apparent that the limitation against such credits or refunds in Section 1106(a) had application to him alone. This conclusion is fully sustained by the final action taken in the case of *Adelaide F. Chapman* v. *United States*, 63 Ct. Cls. 424, in which that Court construed Section 1106(a) of the Revenue Act of 1926 as preventing the plaintiff in a suit from recovering barred taxes unless the taxpayer has actually overpaid the tax. Petition for certiorari was filed by the taxpayer and in a brief submitted on behalf of the United States, in which the Solicitor General agreed that the writ should issue, it was said:

> "After the decision in *Bowers* v. *New York and Albany Lighterage Company, supra*, was handed down and it was disclosed that the Court of Claims was in error in holding that the claim of the United States had not been barred, and on March 31, 1927, the petitioner filed a motion for new trial, which was overruled October 24, 1927. Section 1106(a) was brought to the attention of the Court of Claims in connection with that motion, although the record does not disclose it, and the action of the Court of Claims in overruling the motion can only be explained on the theory that it held that Section 1106(a) operated to prevent petitioner from obtaining a refund of the tax paid notwithstanding that when paid its collection was barred by the statute of limitations.
>
> "The phrase 'but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax,' literally construed, may mean that where a tax has been paid which was barred by the statute of limitations when paid, refund shall nevertheless be denied unless the taxpayer has overpaid the tax in the sense of paying more than was justly due without regard to the statute of limitations.
>
> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in *Graham* v. *Dupont*, *supra*, or prevent distraint proceedings by injunction and may be compelled by the Colector to pay a tax the collection of which is barred by the statute of limitations,

and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

The judgment of the Court of Claims was vacated and the case remanded to enter judgment for the taxpayer. October term, 1928, 49 S. Ct. p. 7; 278 U. S. 660. (See also *Ellay Co.* v. *Bowers*, 25 F(2d), 637; certiorari denied 48 S. Ct. 601.)

The Commissioner of Internal Revenue also was of the opinion that Section 1106(a) of the Revenue Act of 1926 merely limited his right to make refunds and credits of amounts collected after the statutory period for collection had expired and that it did not prevent recovery in the courts. In I. T. 2382, C. B. VI-2-102, issued during the Fall of 1927, the Commissioner of Internal Revenue said:

"Many inquiries are being received both from within and without the Bureau as to the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of *Bowers* v. *New York & Albany Lighterage Company*. Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the *New York & Albany Lighterage Company* decision may have no application to cases where bonds were filed or where claims in abatement were filed, *and that, in view of Section 1106 of the Revenue Act of 1926, the decision should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner*. Furthermore, Section 1106 was not raised in the *Albany Lighterage Company* case and was not considered in connection with the confession of error made by the Government in the *Taxaway Mills* case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the *Albany Lighterage Company* decision to other cases in view of Section 1106.

"In view of the great uncertainty as to the whole matter, it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the *Albany Lighterage Company* decision unless and until the situation

is clarified by further court decisions or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation, and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

The above statement by the Commissioner of Internal Revenue was an invitation by the Commissioner to Congress to pass legislation to clarify his power in making refunds and credits in cases where sums had been collected after the statutory period for collection had expired. Congress answered the invitation of the Commissioner of Internal Revenue by enacting Sections 607 and 611 of the Revenue Act of 1928. By Section 607 Congress provided that any amount collected after the expiration of the period of limitation properly applicable thereto either before or after the passage of the Revenue Act of 1928 shall be considered an overpayment and shall be refunded to the taxpayer if claim therefor is properly filed. In other words, Section 607 merely removed the bar which Section 1106(a) of the Revenue Act of 1926 had imposed upon the Commissioner and made it possible for him to make refunds and credits of amounts collected after the statutory period had expired provided claim for refund was properly filed. This Section had no application to suits in Court since the *Chapman* case, *supra*, clearly shows that the authority of the Court to allow recovery had not been curtailed by Section 1106(a) of the Revenue Act of 1926.

Section 611 of the Revenue Act of 1928 is merely a limitation on Section 607 and provides that in a case where an assessment was made prior to June 2, 1924, and if a claim in abatement was filed, and if the collection of any part of the tax was stayed, then the payment of such part was not to be considered an *overpayment under the provisions of Section 607*. But since Section 611 was merely a limitation upon Section 607 and as Section 607 had no reference to suits in Court it follows as a matter of course that Section 611 likewise had no reference to suits in Court. It was so held in *Diamond Alkali Co.* v. *Heiner*, 39 F. (2d) 643.

(b) SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT WITHDRAW THE CONSENT OF THE UNITED STATES TO BE SUED IN CASES WHERE MONEY WAS COLLECTED AS TAXES AFTER THE STATUTORY PERIOD FOR COLLECTION HAD EXPIRED.

The Government contends that by Section 611 of the Revenue Act of 1928 Congress has withdrawn the consent of the United States to be sued in the Courts in cases falling within the purview of that Section. As already pointed out Section 611 is merely a limitation upon Section 607. Section 607 was an enlargement of the power of the Commissioner of Internal Revenue to make refunds or credits of amounts collected after the statutory period for collection had expired. The *Chapman* case, *supra*, showed that the Courts did not need the additional power which Section 607 gave to the Commissioner of Internal Revenue as they already had it. Since, therefore, Sections 607 and 611 were merely the restoration of authority in the one case and the limiting of that authority under certain conditions in the other case, how can it be contended that these Sections withdrew the consent of the United States to be sued? The word "Court" does not appear in Sections 607 and 611, and there is no statement in either of these Sections to the effect that the right of the petitioner to sue has been curtailed. The jurisdiction of the Court of Claims to entertain the suit of the petitioner was established by the so-called Tucker Act, passed in 1883, which became Section 145 of the Judicial Code and which now appears as Section 250 of Title 28 of the Code of Laws of the United States of America. The question of the jurisdiction of the Court of Claims in cases of this type is no longer in controversy. *Dooley* v. *United States*, 182 U. S. 222; *United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28. The petitioner acquired its right to bring the suit in connection with Section 3226 of the Revised Statutes as amended. Whenever Congress intended to change or modify the provisions of Section 3226 of the Revised Statutes it specifically referred to that section and set forth the particulars in which it was amended. See

Revenue Act of 1921, Chap. 136, Sec. 1318, 42 Stat. 315; Revenue Act of 1924, Chap. 234, Sec. 1014, 43 Stat. 343; Revenue Act of 1926, Chap. 27, Sec. 1113, 44 Stat. 9. Certainly if Congress by any provision of the Revenue Act of 1928 intended to amend Section 3226 specific reference would have been made to this section in the Revenue Act of 1928. Sections 3220, 3228, and 3176 of the revised statutes were amended by the Revenue Act of 1928. See Section 619 of the Revenue Act of 1928. It will be noted that specific reference is made to these sections of the revised statutes and amendments enacted in connection therewith. Certainly if Congress intended to amend Section 3226 it would have appeared specifically as an amendment in the Revenue Act of 1928.

Any Government "of the people, by the people, for the people" will afford its citizens a proper judicial tribunal wherein to fairly litigate wrongs committed by that Government against its citizens, and when that consent has become a matter of settled law, certainly the courts will not by implication determine such consent to have been withdrawn. Such a conclusion should be reached only if the language employed permits of no other construction. Sections 607 and 611 of the Revenue Act of 1928 are not only devoid of any clear language to show a withdrawal of the consent of the United States to be sued but on the other hand they clearly indicate an intent merely to apply to the powers of the Commissioner of Internal Revenue.

Courts of justice have no jurisdiction to make exceptions to a statute, nor to add to the exceptions which the legislature has made, as this would be legislating. Where the language of an act is explicit, it is not for the court to change it by construction based upon some supposed legislative policy. It is not for the court to say that it shall be so construed as to embrace other cases because no good reason can be assigned why they were excluded from its provisions. If the meaning of the legislature is plain, it must be obeyed.

Vol. 4, Ency. of U. S. S. Ct. Reps. p. 228.
United States, et al. v. *Missouri Pac. R. Co.*, 49 S. Ct. 133; 278 U. S. 269.

The rule was tersely stated in *United States* v. *Hartwell*, 6 Wall., 385, 396 (18 L. Ed. 830):

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

This is also the recognized rule of the English courts. In one of the English decisions Lord Denman said the court was bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the Legislature which enacted it.

The King v. *The Commissioners*, 5 A. and E. 804, 816.
See also, *United States* v. *Lexington Mill Co.*, 232 U. S., 399, 34 S. Ct. 337, 58 L. Ed., 658, L. R. A. 1915B, 774.
Caminetti v. *United States*, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442; L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

The petitioner wishes to call the attention of this court to the briefs Amici Curiae filed in the case of *R. E. Graham and E. E. Foster* v. *Rex. B. Goodcell*, 36, October term, 1930, in which the foregoing propositions are discussed in all their detail.

2. (a) IF IT BE HELD THAT CONGRESS INTENDED BY THE ENACTMENT OF SECTION 611 OF THE REVENUE ACT OF 1928 TO DEPRIVE THE PETITIONER OF ITS RIGHT TO RECOVER THE SUM COLLECTED AFTER THE STATUTORY PERIOD FOR COLLECTION HAD EXPIRED, THEN IT IS CONTENDED THAT SUCH ATTEMPT IS UNCONSTITUTIONAL AND VOID IN THAT IT DEPRIVES THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

There is a fundamental distinction between limitation statutes that merely bar the remedy and those which also extinguish the liability. General limitation statutes are of

the former type and their expiration afford to the defendant a mere remedy, namely, the setting up of the defense of the statute of limitations. Since such a statute of limitations affects the remedy only and does not destroy the liability the defendant acquires no constitutional rights of protection and it is within the power of the legislature to alter, amend, or even completely remove the bar of the Statute of Limitations. However, the petitioner shall show that with respect to the latter type of limitation statutes the expiration of the specified time not only bars the remedy but extinguishes the liability and gives to a citizen a vested property right which under the Constitution of the United States is fully protected against any subsequent legislation of Congress.

In support of the above contention the petitioner relies upon no less authority than decisions of this court. In the case of *Toxaway Mills* v. *United States*, 61 Ct. Cls. 363, decided by the Court of Claims under date of December 7, 1925, that Court applied the rule that the bar of the Statute of Limitations found in Federal Tax Acts merely barred the remedy and did not destroy the liability; consequently, the claimant could not, as a plaintiff, sue to recover taxes alleged to have been collected after the bar of the Statute of Limitations since this matter could be raised only as a defense. This theory of the Court of Claims was exploded by this Court in the cases of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, and *Graham* v. *du Pont*, 262 U. S. 234. The Solicitor General of the United States thereupon confessed error in the *Toxaway Mills* case and this Court remanded the case to the Court of Claims with instructions to enter judgment in favor of the plaintiff. 273 U. S. 781. This case in itself shows a distinction between general statutes of limitations and the time limitations as specified in the various revenue acts, since if there is no distinction then the conclusion of the Court of Claims to the effect that the bar of the statute can be raised only as a defense was correct.

This Court recognized the distinction referred to above in the case of *Central Vermont Railway* v. *White*, 238 U. S. at p. 511, when it said:

> "But matters of substance and procedure must not be confounded because they happen to have the same name.
>
> "For example, the time within which a suit is to be brought is treated as pertaining to the remedy. *But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability.*" (Italics supplied.)

And in the case of *Eberhart* v. *United States*, 204 Fed. Rep. pp. 890–891, the Court stated in clear terms the very distinction for which the petitioner now contends. In the course of the opinion the Court said:

> "An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates, * * * because such limitations are conditions of the liability itself and not limitations of the remedy only."

In this connection see also *Bashara* v. *Hopkins*, 290 Fed. 592; affirmed 295 Fed. 319; Certiorari denied, 265 U. S. 584; 44 S. Ct. 459; *Danzer & Co.* v. *Gulf & Ship Island R. R. Co.*, 268 U. S. 633.

Similarly, in the case of *United States* v. *John Barth Company*, 27 Fed. (2d) 782, 784 the Court said:

> "In general, it may be said that statutes of limitation bar only the remedy, but the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes culminating in the Act of 1926, *indicate an intent not merely to bar the remedy but to extinguish entirely all liabilty for the tax, where its determination and assessment is not made within five years after filing the return.*" (Italics supplied.)

The statement of this Court in the case of *Russell et al.* v. *United States*, 49 S. Ct. 121, 123; 278 U. S. 181, shows that it is in full accord with the principle of law announced in the cases referred to above. This Court said:

"Manifestly, but for Section 278 (Revenue Act of 1924), petitioners would be *free from liability under the five year limitation* in the act of 1918, continued by the act of 1921. If Section 278 refers only to assessments made after June 2, 1924, petitioners are not liable.

"If an assessment made before that date comes within the ambit of Section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—*would extend for some five years a liability which had almost expired. United States* v. *Magnolia Petroleum Company*, 276 U. S. 160, 48 S. Ct. 236, 72 L. Ed., 509, declares, 'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.'" (Italics ours.)

It will be noted this Court stated that if it were not for Section 278 of the Revenue Act of 1924 the petitioners would be *free from liability* under the five year limitation in the Act of 1918 continued by the act of 1921. The words "free from liability" are not ambiguous. They can be construed to mean but one thing, namely, upon the expiration of the five year limitation period the liability of the petitioner would have been completely extinguished. Furthermore, this Court said that if Section 278 of the Revenue Act of 1924 were construed to apply retroactively it would extend for some five years the liability which had *almost expired*. The words "almost expired" means that the expiration of time had almost extinguished the liability. They could reasonably have no other meaning.

Other authorities could be cited to the same effect. The cases referred to seem to establish beyond any doubt that the time limitation provisions found in the various Revenue Acts not only bar the remedy at the expiration of the period specified but that they also extinguish the liability.

(b) UPON THE EXPIRATION OF THE TIME LIMITATION PROVIDED FOR BY THE REVENUE ACTS, THE PETITIONER ACQUIRED A VESTED PROPERTY RIGHT.

Kent, in his Commentaries, Vol. 4, page 202, defines a vested right as follows:

> "A vested right is an immediate right of present enjoyment, or a present, fixed right of future enjoyment."

In the case of *Pearsall* v. *Railway Company*, 161 U. S. 646, this Court said:

> "Rights are said to be vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

In the case of *Gladney* v. *Syndor*, 172 Mo. 318, the Court said:

> "Vested rights may be created either by the common law, *by statute*, or by contract, and it makes no difference as to the method of their creation, *they are entitled to the same protection.*" (Italics supplied.)

When we consider the above definitions there appears to be no doubt that when the passing of time under the various Revenue Acts extinguished the liability of this petitioner with respect to its tax liability for the year 1918 it acquired a vested right of present enjoyment in the realization that no further liability remained for that year and this realization, upon the expiration of the time limitation under the statute, was just as effectual as though the petitioner had taken its money to the Collector of Internal Revenue before the expiration of the period and removed the liability by a payment in cash. In the latter case the liability would have been removed by payment in cash while in the former case the liability was removed by operation of law. The result in either case would be exactly the same, namely, the extinguishment of the liability. It seems fundamental that a taxpayer who paid his liability in cash thereby acquired a vested right not to be called upon again to satisfy the same liability. For the same reason the taxpayer whose liability is extinguished by operation of law acquires a vested right of present enjoyment in knowing that

the liability which had been extinguished is forever gone. The petitioner shall show that such a right is fully protected under the Fifth Amendment of the Constitution of the United States.

(c) IF SECTION 611 IS SO CONSTRUED AS TO DEPRIVE PETITIONER OF ITS PROPERTY AND ITS VESTED RIGHT OF ACTION OF RECOVERY, IT WOULD BE CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION.

If this Court determines that Congress intended by Section 611 to deprive petitioner of its property and also of its vested right of action of recovery, this Section would be violative of the Fifth Amendment, and void so far as petitioner's case is concerned. The decisions of this Court sustain the petitioner in this contention.

Mr. Justice Chase, in the case of *Calder* v. *Bull*, 3 Dall. 385, at p. 388 (1 L. Ed. 648), said:

> "There are acts which the Federal or State Legislatures can not do, without exceeding their authority, * * * as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I can not call it a law), contrary to the great first principles of the social compact, can not be considered a rightful exercise of legislative authority * * * or a law that takes property from A. and gives it to B; it is against all reason and justice, for a people to intrust a Legislature with such powers; and therefore, it can not be presumed that they have done it."

To apply Section 611 to petitioner's case, notwithstanding Section 715, the Separability Clause of the Revenue Act of 1928, would render that section unconstitutional.

Nichols v. *Coolidge*, 274 U. S. 53; 52 A. L. R. 1081.

Blodgett v. *Holden*, 275 U. S. 142.

Untermyer et al. v. *Anderson, Collector of Internal Revenue*, 276 U. S. 440; 48 S. Ct. 353.

Justice demands that petitioner be permitted to assert its legal and constitutional rights on reasonably equal terms with the respondent before an impartial judicial tribunal.

Atchison, Topeka & Santa Fe Railway Company v. *O'Connor*, 223 U. S. 280.

Christie-Street Commission Co. v. *United States*, 136 Fed. 326, 69 C. C. A. 464.

Emery, Bird, Thayer Realty Co. v. *United States*, 198 Fed. 242 (affirmed 237 U. S. 28).

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d), 146.

In the case of *Rock Island Ry. Company* v. *United States*, 254 U. S. at page 143, this Court said that men must turn square corners when they deal with the Government. Should not the Government also be required to turn square corners when it deals with its citizens?

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 384.

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or *deprive one of a vested property right*. If the changing or repealing statute *leaves the parties a substantial remedy, the legislature does not exceed its authority*. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. * * * The right to compensation was a vested property right." (Italics supplied.)

Ettor v. *Tacoma*, 228 U. S. at pp. 155, 156 and 158.

Smallwood v. *Gallardo*, 275 U. S. 56; 48 S. Ct. 23.

In the early case of *Dartmouth College* v. *Woodward*, 4 Wheat, 518, this Court laid down the rule that where individuals have acquired absolute or vested rights under a statute a subsequent repeal can not divest these rights.

And in the case of *Pritchard* v. *Norton*, 106 U. S. 132, this Court said:

> "A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the legislature to take it away."

In the case of *Memphis* v. *United States*, 97 U. S. p. 293, this Court said:

> "We do not deny that it is competent for a legislature to repeal an Act which when it was passed was a mere gratuity, *if while it was in existence no vested rights have been acquired under it or in virtue of it.*" (Italics supplied.)

A similar conclusion was reached by the Court in *United States* v. *Henrich*, 12 Fed.(2d) 940, viz:

> "My conclusion here is that Congress can not enact a law that would destroy, impair or injuriously affect rights that have vested under a former constitutional enactment, and that to enforce the Act of June 4, 1920, against the defendant and require him again to pay for his property would be in violation of the constitutional guarantee heretofore cited." (Fifth Amendment of the Constitution of the United States.)

A law can be repealed by the lawgiver, but the rights which have been acquired under it while it was in force do not thereby cease. This was the rule of the civil law and has been strictly adhered to in England where there is no express restriction upon legislative power. *County of McCracken* v. *Mercantile Trust Company*, 84 Ky. 314; 1 S. W. 585.

In the case of *Crump* v. *Guyer*, 157 Pac. 321; 2 A. L. R. 331, the Court reached the same legal conclusion, and then said:

> "To hold otherwise would leave us at sea and place it in the power of the legislature at will to disturb, and even destroy by subsequent legislation rights which had accrued under existing laws."

By what right does the United States retain this illegally collected sum, or what statute creates and imposes any new liability upon this petitioner, or precludes it from recovering back the illegally collected sum of money, or what law or statute of Congress could deprive petitioner of its property and authorize the United States to keep and retain its property in violation of the Fifth Amendment of the Constitution? Certainly Section 611 did not confer such right and authority in the respondent.

This Court, in the case of *De Lima* v. *Bidwell*, 182 U. S. p. 199, speaking through Mr. Justice Brown, said:

> "As the action in this case was brought March 13, 1900, eleven days before the act was passed, *the right to recover the money sued for could not be taken away by a subsequent act of Congress.*
>
> "Plaintiffs sue in assumpsit for money which the Collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. In any event, it should not be interpreted so as to make it retroactive."

To the same effect is *Lincoln* v. *United States*, 202 U. S. p. 485. In this connection we invite the Court's attention to the arguments presented by the appellants and the United States in this latter case, at pp. 485–495, for the reason that many of the questions there discussed are similar, if not identical, to most of the questions involved in the instant case.

(d) CONGRESS WAS WITHOUT POWER TO EXTEND THE STATUTORY BAR, IN PETITIONER'S CASE, AFTER IT HAD FALLEN AND PETITIONER HAD ACQUIRED A VESTED PROPERTY RIGHT.

A claim for abatement, by no stretch of the imagination, can be construed so as to extend the statute of limitations, except, of course, such claims for abatement as came within the scope of Sections 214 and 234 of the 1918 and 1921 Revenue Acts.

As claims for abatement were recognized prior to the enactment of Section 250(d) of the Revenue Act of 1921 and have

been directly legislated on in that Section, that Act, for the first time, specifically provided that taxes should be determined and assessed within five years after the return was filed, *unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.* *Bowers, etc.* v. *New York & Albany Lighterage Company, et als.*, 273 U. S. 346, at p. 351; 47 S. Ct. 389, at pp. 390–391). This Court held in the case of *Botany Worsted Mills* v. *United States*, 278 U. S. 282; 49 S. Ct. 129:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

Moreover, if a claim for abatement in all cases "stayed" the running of the statute, the enactment of Section 611, of the Revenue Act of 1928, would be of no significance whatsoever. (*Danzer & Co.* v. *Gulf & Ship Island R. R. Co.*, *supra;* and *Bessemer Coal & Coke Co.* v. *Heiner*, 39 F. (2d), 492.)

Under Section 250(d) of the Revenue Act of 1921, as construed by this Court in the case of *Bowers, etc.* v. *New York and Albany Lighterage Company, et al.*, 273 U. S. 346, the claim of the United States for the alleged additional tax against this petitioner was barred by the operation of the limitation statute prior to the time when it was collected and any collection by means of distraint proceedings instituted after the five year period was unlawful.

Upon its payment under protest and duress when barred it became a tax illegally collected, and the petitioner was entitled to its refund and to maintain a suit to recover the amount paid.

Under the decision in *Graham* v. *du Pont*, 262 U. S. 234, the petitioner could not have maintained an action to restrain collection of the tax on the ground that it was barred by the Statute of Limitations. It was compelled to pay the additional tax with the right then to demand a refund.

After its claim for refund was made, the petitioner filed its suit in the Court of Claims, and while its suit was pending Section 611 of the Revenue Act of 1928 was enacted.

Section 611 should not be interpreted to be retrospective in operation so as to destroy a right to recovery in a case where a suit was properly filed and was pending at the time of the passage of the Revenue Act of 1928 because, if so construed, the result would be to discriminate between the petitioner, whose case had not proceeded to final judgment, and those taxpayers whose cases had proceeded to judgment as in the cases of *Bowers* v. *New York & Albany Lighterage Company et al. supra*, and *Russell* v. *United States, supra*. Furthermore such construction would deprive the petitioner of a vested property right to recover by judgment the amount of money sued for which would be in violation of the Fifth Amendment.

It is further contended that a subsequent Congress does not have the power to declare that money which a former Congress, and this Court, have said belongs to a taxpayer because unlawfully and illegally collected by duress, shall be retained by the Treasury Department.

3. THE LEGAL PRINCIPLES ESTABLISHED BY THE CASES OF UNITED STATES v. HEINSZEN, 206 U. S. 370; RAFFERTY v. SMITH, BELL & COMPANY, 257 U. S. 226; AND CAMPBELL v. HOLT, 115 U. S. 620, DO NOT APPLY TO THE CASE OF THIS PETITIONER.

The lower Courts that have decided in favor of the Government on the issue found in the case of this petitioner relied principally upon the three cases cited in the above heading. It is submitted that the principles announced in these cases have no application to the case of this petitioner. The cases of *United States* v. *Heinszen* and *Rafferty* v. *Smith, Bell & Company*, merely raised the question of the right of Congress to pass an act legalizing and ratifying the imposition and collection of duties by the authorities of the United States in the Philippine Islands prior to the passage of the Act. The only question of constitutional law involved in this issue was whether or not Congress could pass a law imposing a tax or a duty retroactively. There is no doubt but that Congress has such power. However, the application of Section 611 of the Revenue Act

of 1928, if it be held to be an attempt to deprive this petitioner from recovering, presents an entirely different question of constitutional law. The act under consideration in the *Heinszen* case created an original liability retroactively. On the basis of the argument of the Government, Section 611 would not result in the creation of an original liability but would be an attempt to recreate a liability that had been created by a prior Revenue Act, which liability had been completely extinguished by operation of law upon the expiration of the period specified in the statute.

This distinction is clearly shown by this Court in the case of *Forbes Boat Line* v. *Commissioners, etc.*, 258 U. S. 338, 339. When speaking through Justice Holmes the Court said:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen & Co.*, 206 U. S. 370; (*Rafferty* v. *Smith, Bell & Company*, 257 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

The case of *Campbell* v. *Holt, supra*, involved the breach of a common law liability on a contract. This Court held that the expiration of the bar of limitations applied to the remedy only, and did not extinguish the liability. Consequently, subsequent legislation affecting the remedy did not deprive the citizen of his property without due process of law. It is quite apparent that the principle in the case of *Campbell* v. *Holt* does not apply to the case of this petitioner. The Court

recognized the distinction in the case of *Eberhart* v. *United States*, *supra*, when it said (page 511):

> "They (statutes of time limitation that not only bar the remedy but extinguish the liability) are excepted from the rule announced in *Campbell* v. *Holt*, 115 U. S. 628; 6 Sup. Ct. 209; 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the legislature may not overthrow at pleasure by extending the time for collecting it."
>
> See also *Danzar* and *Bashara* cases, *supra*.

It is submitted, therefore, that the principles of law found in the three cases relied upon by the lower Courts have no application to the case of this petitioner and are not authorities to defeat its vested property rights.

CONCLUSION.

In conclusion the petitioner contends that Sections 607 and 611 of the Revenue Act of 1928 are administrative provisions affecting only the Commissioner of Internal Revenue; that they in no sense can be construed as a withdrawal by the United States of its consent to be sued; that upon the expiration of the time specified in the statute the petitioner acquired vested property rights, subject to the protection of the Fifth Amendment of the Constitution of the United States, and that it is beyond the power of Congress to affect those rights by any subsequent legislation.

Respectfully submitted,

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